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Supreme Court of the United States

October Term, 1942

No. 466

In the Matter

of

NATIONAL SURETY COMPANY, in Liquidation.

DEPARTMENT OF BANKING, STATE OF NEBRASKA, as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska,

Petitioner,

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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The Opinions Below

The Court of Appeals and the Appellate Division of the Supreme Court, First Judicial Department, unanimously affirmed the order of Special Term without opinion. Special Term of the Supreme Court, New York County, by memorandum decision (fols. 1057-1059) confirmed the

report of the referee (940-1053) who had recommended the disallowance of the claim under the Nebraska judgment and the allowance of the claim for the sum of $3,339.22 under common law proof.

Question Presented

Whether a judgment, entered in the State of Nebraska, in an action instituted by service of process in said State upon the former statutory agent, against National Surety Company after its dissolution in the State of New York, is binding on the Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company, and is entitled to full faith and credit in New York?

Under identical facts, such a judgment was held to be null and void and not entitled to full faith and credit in New York. *Matter of National Surety Company* (*Laughlin*), 283 N. Y. 68, certiorari denied *sub. nom. Laughlin* v. *Pink*, 311 U. S. 707.

Statement

On August 14, 1930, National Surety Company wrote five fidelity bonds covering five officers of the Farmers State Bank of Callaway, Nebraska. On December 28, 1933, the Bank was closed and Petitioner took possession of its assets for liquidation (843).

On June 1, 1934, by order of the Supreme Court of the State of New York, New York County (901-927), the Superintendent of Insurance of the State of New York took possession of the assets of National Surety Company for liquidation. Title to all the assets were vested in the Superintendent to deal with them in his own name, the corporate charter of the Company was revoked, and all persons had until April 1, 1935, to file claims.

On June 2, 1934 (928-939), Petitioner sent the former National Surety Company an alleged proof of loss under the bonds in the form of "STATEMENT OF CLAIM AGAINST NATIONAL SURETY COMPANY. STATEMENT OF CLAIM AGAINST NATIONAL SURETY CORPORATION," sworn to the 22nd day of May, 1934 (304-361). On June 13, 1934 (172-179) the Liquidator returned the notice of loss, prepared and sworn to before the date of liquidation, as not complying with the terms of the bonds, and enclosed a copy of the liquidation order giving Petitioner notice of the dissolution of the Company and of the requirement to file claims on or before April 1, 1935.

Petitioner disregarded this notice and the provisions of said order and on August 25, 1934, instituted suit in Nebraska against the dissolved National Surety Company by service of process on the former statutory agent (364-370). On September 13, 1934, the Liquidator, again notified Petitioner of the necessity to file claim and that all actions against the Company had abated due to its dissolution (373-379).

On July 1, 1938, Petitioner entered judgment by default against National Surety Company in Nebraska in the sum of $29,854.44 (379-421).

On December 6, 1938, the Liquidator, after considering the claim timely filed, recommended the claim for disallowance (679-684) to which Petitioner filed objections (685-712). The issues thus raised were referred. Hearings were intermittently held from January 12, 1940 to June 5, 1941 (22-171). The referee recommended the allowance of the claim under common law proof for the sum of $3,339.22 and the disallowance of the claim under the Nebraska judgment (940-1053).

Petitioner, as statutory receiver and liquidating agent in Nebraska of insolvent state banks, represents the creditors of the insolvent Farmers State Bank of Callaway, Nebraska. Respondent, as statutory liquidator in

New York of insolvent insurance companies, represents the creditors of the insolvent National Surety Company.

On this application the Attorney-General of Nebraska appears for Petitioner for the first time in the prosecution of this claim.

Summary of Argument

Upon the issuance of a license to National Surety Company to do business, the State of Nebraska accepted, recognized and was charged with notice of the charter of National Surety Company and with the Laws of New York under which the Company was incorporated and dissolved. When dissolution occurred on June 1, 1934, the corporate existence of the Company terminated. All actions then pending or thereafter instituted, abated; the authority of the statutory agent to accept process, was revoked; and all judgments, entered in said actions, were null and void against the assets of the Company in New York and were not entitled to full faith and credit in New York.

POINT I

The judgment entered in Nebraska is null and void as to assets held by the Liquidator of National Surety Company in New York and is not entitled to full faith and credit under Article IV, Section 1 of the Constitution of the United States.

The corporate existence of National Surety Company was terminated on June 1, 1934, by the order of liquidation; Petitioner instituted suit against the Company after dissolution by service of process in Nebraska on the former statutory agent of the Company; and judgment was en-

tered on default against the dissolved Company on July 1, 1938.

In the Matter of National Surety Company (*Laughlin*), 283 N. Y. 68; certiorari denied 311 U. S. 707, the above identical facts were the basis of the decision.

The Court of Appeals, in the latter case by unanimous opinion, laid down certain rules of law and reaffirmed others, holding: that all persons who had contracted or done business with the dissolved corporation were charged with knowledge of and were bound by the statutes governing the termination of its corporate existence upon dissolution, and its liquidation; that the New York Insurance Law governed the dissolution of National Surety Company and provided for the immediate cessation of its corporate life; that the common law rule, that upon the dissolution of a corporation all actions pending or thereafter instituted, abate and judgments thereafter entered are null and void, is applicable to the dissolution of National Surety Company; that such judgments entered against the dissolved corporation in a foreign jurisdiction are null and void in the State of incorporation; that the Mississippi judgment had no extraterritorial effect, was null and void in New York and was not entitled to full faith and credit; that the authority of the statutory agent of Mississippi was revoked and ceased to exist upon the dissolution of National.

Realizing that the above principles were applicable to the case at bar, Petitioner appeared *amicus curiae* in the *Laughlin* case in the Court of Appeals and again in this Court on the application for a writ of certiorari which was denied (*Laughlin* v. *Pink*, 311 U. S. 707).

An attempt has been made to distinguish between the case at bar and the *Laughlin* case; first because of an alleged rejection of the claim and second, because the State of Nebraska returned all assets of National Surety Company to the State of New York for liquidation and thereby impliedly gave Petitioner the right to sue in any court in Nebraska of its own choice.

The evidence does not sustain the alleged rejection of claim (928-939; 172-179; 373-379) but shows that the Liquidator notified Petitioner of the dissolution of the Company and of the necessity to file claim. Both were disregarded.

The return of the assets by Nebraska to New York was in accordance with the established law of the State of Nebraska.

> *Kinsler* v. *Casualty Co. of America*, 103 Neb. 382; 172 N. W. 33 (1919);
> ***State ex rel. Sorensen, Atty. Gen.*** v. *State Bank of Omaha*, 136 Neb. 880; 287 N. W. 762 (1939).

Under these decisions, contrary to the contention of Petitioner, the State of Nebraska, when it issued a license to National Surety Company, not only was charged with notice of its charter and the statutes of New York governing the incorporation, continuance and dissolution of the Company, but also, if the Company was declared insolvent, that the Superintendent of Insurance would succeed to the title of all its assets, wherever located, for the benefit of all creditors, whether residents of New York or of foreign states.

This Court, in the case of *Fischer* v. *American United Life Ins. Co.*, 62 Sup. Ct. 380, recently had occasion to comment on the significance and import of the prevailing law of the State of Iowa regarding the retention of the assets of a dissolved corporation for the benefit of creditors in Iowa, by a receiver appointed in Iowa. This Court, speaking through Mr. Justice DOUGLAS, held at page 382:

> "Even though the latter were true, claimants entitled to the benefits of the fund in Iowa might pursue their suits and remedies against it in derogation of the claim of the Michigan receiver, if that were Iowa's policy. *Clark* v. *Williard*, 294 U. S. 211, 55 Sup. Ct. 356, 79 L. Ed. 865, 98 A. L. R. 347. That is the asserted Iowa policy here."

The asserted policy of Nebraska was to recognize the title of the Liquidator in New York to all assets of National Surety Company and to send all assets to New York where claimants, including Nebraskians, could file and prove their claims. Rather than abide by this asserted policy, Petitioner brought action against the dissolved Company and then, without success, attempted to overrule, in the *Sorensen* case, *supra*, the established law of Nebraska as expressed in the *Kinsler* case, *supra*.

Petitioner, mindful of the Nebraska law, implies and assumes that the Nebraska Courts, retained the right to pass on the merits of Nebraska claims. The implication and assumption are wholly without basis. Nebraska never had *in personam* jurisdiction over the Liquidator. It relinquished *in rem* jurisdiction in favor of the Liquidator. Yet, Petitioner contends that the absence of the former and the yielding of the latter is equivalent to both being retained.

Petitioner, in support of the merits of its claim before the referee, first offered proof in the form of the Nebraska judgment and then proof of the alleged losses under the bonds. Hearings were conducted over a period of a year and five months. Although Petitioner had every opportunity to prove its claim, it was held by all the New York Courts, by unanimity of opinion, that the Nebraska judgment was null and void and that common law proof sustained a claim in the amount of $3,339.22.

National Surety Company did business in all of the States of the Union and in the District of Columbia. In thirty-eight States and in the District of Columbia, receivership proceedings were instituted.

The Attorney Generals of thirteen States appear herein as *amici curiae* as they did before the Court of Appeals in New York. In four of these States, Colorado, Montana, North Dakota and Wyoming, no receivers were appointed. Of the nine States where receivers were appointed, the receivers in the four States of Connecticut, Indiana,

Montana and Utah sent the claims filed with them to New York for determination. In the four States of Florida, Georgia, Texas and Ohio, the receivers decided the validity of the claims filed there. In Kentucky, although a receiver was appointed, no claims were filed.

The said Attorney Generals have erroneously concluded that the decision of the Court of Appeals herein has established the domiciliary jurisdiction in New York as the only jurisdiction wherein claims could be filed and determined. The receivership proceedings of National Surety Company in thirty-nine ancillary jurisdictions, including nine of said thirteen States, belie this conclusion. Actually, the Attorney Generals, through a misconception of the true facts, disagree with the nullification of the Nebraska judgment as the basis for a claim because the New York Courts have adhered to established principles of law and because the asserted policy of Nebraska does not coincide with the proposition in which they and the aggrieved Petitioner are interested.

Since these Attorney Generals are concerned over and are solicitous for the welfare of their respective local citizens, it is recommended and suggested that they expend their efforts, not in criticizing the fundamental laws of this Land, but toward adopting the Uniform Insurers Liquidation Act (9 Uniform Laws Annotated) which has been enacted into the New York Insurance Law, §§ 517-524 and which is available to all States.

The Act provides a plan or method of determining the liabilities of a delinquent insurer authorized to do business in a foreign state where both the state of incorporation and the foreign state are parties to the Act. Upon the entry of an order of liquidation, the state of incorporation establishes a domiciliary liquidation proceeding; the foreign state may set up an ancillary proceeding. With both in existence, local creditors in the foreign state with controverted claims may either prove their claims in the domiciliary or in the ancillary proceeding and if, in the

latter, the determination of the claims is binding on the domiciliary receiver. If there is no ancillary proceeding, all claims must be proved in the domiciliary proceeding (§§ 4 and 5 of the Act).

Thus, whatever the situation, all claims are required to be established in a liquidation proceeding conducted either by the superintendent of insurance in the domiciliary state or in the foreign state. No creditor is given the right to sue, and special proceedings for the collection of the amount claimed outside the liquidation proceedings are expressly prohibited (§ 9 of the Act).

To permit claimants to adopt the procedure of obtaining a judgment in the local courts, foreign or domestic, outside of the liquidation proceeding, would materially disrupt, hamper and delay the orderly liquidation of an insolvent insurer and greatly increase administration expenses. The domiciliary liquidator would either have to appear by local counsel in the local courts in every state of the Union at a prohibitive expense or suffer default judgments to be taken which, if binding on the Liquidator, would unjustifiably reduce the assets in his possession for distribution among creditors who abided by and followed the statutory regulations for the allowance of claims.

Conclusion

There is no conflict in decisions, nor has the Court below disregarded any decisions that could possibly lead to a different result. On the contrary, it is submitted that the decision of this Court in *Laughlin* v. *Pink,* 311 U. S. 707, to deny certiorari, should be followed herein. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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